

Department of Justice
Washington, D.C. 20530

Justice
 0153/4

March 28, 1978

Mr. James McIntyre
 Director
 Office of Management and Budget
 Washington, D. C. 20503

Dear Mr. McIntyre:

This letter is in further response to a request from Congress for comment on S. 1845, a bill "to protect the rights of individuals guaranteed by the Constitution of the United States and to prevent unwarranted invasion of their privacy by prohibiting the use of polygraph type equipment for certain purposes."

Discussions between my staff and the Office of Legislative Counsel of the Central Intelligence Agency have resulted in agreement on revised language that the Administration could submit to remedy a number of problems raised by various Departments and Agencies concerning the bill's prohibition on polygraph testing in employment.

We would change section 247(b)(1) to read:

"(b)(1) No officer or employee of the United States nor any person acting for or on behalf of the United States shall require or request any officer or employee of the United States, or any individual seeking employment as an officer or employee of the United States, to take any polygraph test in connection with his or her services or duties as an officer or employee, or in connection with such individual's application or consideration for employment, except that such polygraph tests may be administered --

(A) in the course of an investigation by a law enforcement agency of an alleged criminal act committed by an officer or employee of the United States, provided that--



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(i) there is probable cause to believe that such officer or employee has committed a criminal act;

(ii) such officer or employee freely and voluntarily consents to the polygraph test after being informed of the nature of the allegations against him, his privilege against self-incrimination, and his right to counsel; and

(iii) any such employee's refusal to submit to a polygraph test may not be used in any manner against him, either in the criminal investigation or in future personnel action, and no record of the polygraph test or the refusal to submit to it may be maintained outside law enforcement files; and

(B) to officers or employees of, persons assigned or detailed to, or affiliated with, any agency or department of the United States, as well as applicants or candidates for such positions or affiliations, if such persons actually perform or would perform national security, intelligence, or counterintelligence functions or support or security duties related to such functions, and to contractors selected by any such agency or department to perform such functions or duties."

We would also change section 247(b)(2) to read:

"(2) Except as permitted by subsection (b)(1)(B) of this section, no person engaged in any activity in or affecting interstate commerce, and no individual acting under the authority of such person, shall--

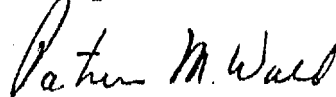
(A) require or request any individual seeking employment in connection with such business or activity to take any polygraph test in connection with his application or consideration for employment; or shall accept or use the results of any polygraph test in connection with such application; or

(B) require or request any individual employed by such person to take any polygraph test in connection with his or her services or duties as an employee; or shall accept or use the results of any polygraph test, unless the employee freely and expressly requests to take such a test and the request is not a product of coercion or intimidation by the employer."

We believe that the concern expressed by the Department of State in its letter of December 29 has been met by the insertion of a comma between "national security" and "intelligence" in the sixth line of paragraph 247(b)(1)(B). This makes it clear that national security functions alone may be the basis for polygraph testing in appropriate circumstances, and that such functions need not be related to an intelligence or counterintelligence mission. We believe that the language proposed here is more precisely tailored to limit government polygraph testing to those areas where it is clearly necessary than the broader formulation proposed by the Department of Defense.

I hope that these revisions meet the concerns that have been expressed within the Administration about the bill, and that we can now submit our views to Congress.

Sincerely,



Patricia M. Wald
Assistant Attorney General
Office of Legislative Affairs

cc:



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